U.S. Department of Labor

Office of Administrative Law Judges
11870 Merchants Walk, Suite 204
Newport News, Virginia 23606

(757) 591-5140
(757) 591-5150 (FAX)

Issue Date: 11 July 2003

Case No: 2003-LHC-00413

OWCP No.: 06-120820

In the Matter of:

DONALD H. WEBB,
Claimant,

v.

PUERTO RICO MARINE SHIPPING/
NATIONAL UNION FIRE
Employer/Insurer

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-In-Interest.

DECISION AND ORDER

This proceeding arises from a claim under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901 *et seq* (the "Act"). Donald H. Webb ("Claimant") sought compensation for an injury sustained while in the course of employment at Puerto Rico Marine Shipping ("Employer").

A hearing was held on the above-referenced claim on February 4, 2003 in Jacksonville, Florida. The parties were given the opportunity to submit exhibits at that time, and Claimant entered exhibits 1 through 127, and Employer submitted exhibits 1 through 6.

I. Stipulations

The Employer and Claimant agreed and stipulated as follows:

1) That an employer/employee relationship existed at all relevant times;

2) That the parties are subject to the jurisdiction of the Longshore & Harbor Workers' Compensation Act;

3) That Claimant sustained an injury arising out of and in the course of employment to his back on January 1989;

4) That Claimant also received care for psychiatric treatment, consisting of medications and counseling;

5) That a timely notice of injury was given by the employee to the employer;

6) That Claimant filed a timely claim for compensation for his injury.

II. Issues[1]

The issues to be determined by this Court include:

1) Claimant's average weekly wage;

2) The nature and extent of Claimant's disability;

3) Claimant's date of maximum medical improvement.

III. Facts

Claimant is a 47 year old male who graduated from high school and attended two years of vocational community college for air conditioning and refrigeration. (Tr. 25).[2] Prior to working at Puerto Rico Marine Shipping, Claimant held positions as a maintenance worker at a motel and an

[1]Both Claimant and Employer also presented the issue of whether attorney's fees may be awarded despite the fact that an informal conference was never held. The Court will not address this issue until the final decision has been issued and counsel for the Claimant has submitted a fee petition.

[2]The following abbreviations will be used as citations to the record:
CX–Claimant's Exhibits;
EX–Employer's Exhibits;
Tr.–Hearing Transcript with ALJ.

apartment complex. (Tr. 25). Claimant had also suffered a lower back injury before working for Employer. (EX-1-80). Based on his prior injuries, Employer also filed for Section 8(f) relief, and has received notification from the District Director that such relief would be granted. (EX-6). Such relief is contingent on this Court's determination of Claimant's date of maximum medical improvement, average weekly wage and nature and extent of his disability.

Claimant testified that he began work at Puerto Rico Marine Shipping approximately in February 1979 as a refrigeration mechanic. Claimant described his work as repairing compressor component parts. (Tr. 26). According to Claimant, his job consisted of carrying 150 pound parts and rebuilding them.

Claimant testified that he was injured while working for Employer on January 13, 1989. Claimant testified that he was pulling a compressor when he felt a pain travel down his back and legs. He stated that he passed out momentarily, and then immediately went to be treated by Dr. Ethan O. Todd. (Tr. 26). According to Claimant, treatment lasted for about a month and consisted of physical therapy that included massage, electric shock, and hot and cold presses. (Tr. 26). The medical reports completed by Dr. Todd on the date of Claimant's injury state

> On examination, he has only about 50% normal range of motion of the low back with paralumbar spasm limiting his motion. He can, however, reverse the lumbar lordosis. There is no tenderness over the sciatic notch on either side. No reflex or sensory changes in his legs. No EHL weakness, straight leg raising and Lasegues are positive at 80 degrees, bilaterally.

(EX-1-143). Dr. Todd sent Claimant to undergo physical therapy daily for a week and recommended that Claimant not return to work until his condition improved. (EX-1-143).

On January 20, 1989 Dr. Todd met with Claimant again, and remarked that Claimant was still experiencing pain in his back, although his condition had improved. Dr. Todd recommended another week of physical therapy and that Claimant not return to work. (EX-1-143).

On January 27, 1989, Dr. Todd again examined Claimant and remarked that Claimant's back motions were 75% normal. Dr. Todd recommended another week of physical therapy without work. On February 3, 1989, Dr. Todd stated

> Has a full painless range of motion of the low back, no tenderness over the sciatic notch on either side. He is a little sore from doing his exercises, but I am going to give him a note to go back to work 2/6/89.

(EX-1-144). On February 6, 1989, Dr. Todd met with Claimant, who indicated that he could not begin work due to back pain. Dr. Todd noted that Claimant's back motions were 60% of normal,

and placed Claimant back into a physical therapy regimen. Dr. Todd also noted that Claimant again could not work.

Following Claimant's injury, Claimant returned to work with Employer, but testified that he could do very little work due to his injury and pain, and therefore he returned to Dr. Todd. (Tr. 27). Claimant testified

> After I went back out of work I got in touch with Graham Smith and got the approval from the insurance company to see this doctor as my attending physician, and he did several tests and found out that I had some problems with my lower back that needed some fusion.
>
> And I agreed to that and he did the surgery. I believe it was August. August 15th of '89, if I'm not mistaken. And then I had the recuperation time, and then he sent me to some work hardening program.
>
> And then at that point, the Labor Department set me up to go to school. And I actually went to school for physics–physics education track paid for, funded by the Labor Department.

(Tr. 27). In a letter to the insurance adjuster, dated June 28, 1989, Dr. Graham Smith, Claimant's treating physician, wrote,

> This chap was hurt in January at work and after six weeks of physical therapy returned temporarily for about eight weeks at work. His symptoms are of terrible low back pain. After he stopped working in May, he was referred to me and we have discovered two things. He has a huge herniated lumbar disc at L5-S1 and a degenerate leaking painful disc at L4-5. It is my belief that after six months of significant backache and disability and now developing symptoms of numbness and tingling in both feet from the disc herniation, he should undergo spinal fusion with discectomy at L5-S1.

(EX-1-51). Medical reports confirm that Claimant underwent surgery on August 15, 1989. (EX-1-54). In a Preoperative Note and Postoperative Note completed by Dr. Smith, he documented that Claimant underwent a L5-S1 discectomy and a spinal fusion on the L4-5-S1. (EX-1-51).

Claimant testified that the courses that he was enrolled in became increasingly challenging for him, and finally he dropped out of the courses. He stated that physically,

> I wasn't doing good at that point, either. But I did the best I could, and I wanted to be a physics teacher. I tried to, you know, what the Labor Department wanted me to do, but it just – I just couldn't do it.

(Tr. 28). After leaving school, Claimant testified that he applied for a substitute teaching position in Clay County. According to Claimant, he substitute taught for two years, and worked approximately one or two days a week earning $7.35 an hour. Claimant testified that while he was teaching the pain in his back became so unbearable that he could not concentrate, and eventually he had to stop teaching. (Tr. 28). Claimant testified that over the course of two years Claimant earned a total of approximately $2,100 a year.

Claimant then stated that he found a job working as a lifeguard at the YMCA. Claimant stated that he worked three or four days a week for two hours a day. He stated

> They wanted me to sit in a chair or stand by the chair and watch the pool for like two hours, and I usually couldn't make two hours and I'd have to have a replacement come in and after the second summer of that going on, then they said they didn't need me anymore because I couldn't stay at my work station.

(Tr. 30). Following the lifeguard position, Claimant stated that he did not look for another job. He testified that he stopped looking for employment because he has difficulty doing any physical activity. He stated

> If I stay on my feet an hour or if I'm sitting an hour, my back pain gets so horrific that I just–I have to lay down. I have to lay down and that relieves most of my pain.

(Tr. 30). Claimant stated that standing does not relieve back pain when he is sitting, and sitting does not relieve back pain when he is standing. (Tr. 31). He has not undergone more surgery, although Dr. Smith recommended more surgery approximately two and a half years ago. Claimant declined further surgical procedures, and stated

> Well, after going through the first back surgery, the pain that I experienced for approximately three days after that surgery, it was so horrible. I remember being in a drug-induced coma for three days, and then waking up and still in severe pain from that surgery. I don't ever want to go through that horrible experience again. Ever.

(Tr. 31-32). At the time Claimant testified, he stated that he spends much of his time at his home. He stated that if he does an activity for an hour or and hour and a half, he has to lay down for an hour and a half.

Claimant's wife also testified to Claimant's current medical condition. She stated that when Claimant was substitute teaching, he would spend three or four days recuperating with bed rest in pain. (Tr. 41). She testified

> He told me that his legs hurt and that his back, the back part of it just felt like it was–it was going to kill him it was just so painful. But he would be flat on his back for three to four days.

(Tr. 41).

Employer/Carrier paid temporary total disability payments from January 17, 1989 to May 17, 1990 at a compensation rate of $636.24 per week. From May 18, 1990 to July 27, 2000, permanent partial disability payments have been paid in the amount of $594.19. From July 28, 2000 to the present, the Employer/Carrier has been paying permanent partial disability benefits in the weekly amount of $389.06.

IV. Preliminary Matters

Employer presented the testimony of John B. Roberts, a rehabilitation counselor. Claimant's counsel objected to the testimony of Mr. Roberts, based on the Employer's noncompliance with this Court's pretrial order. Specifically, the pretrial order ordered both parties to exchange witness lists and provide copies of any labor market survey submitted or relied upon by counsel at least 20 days prior to the formal hearing. Counsel for the Claimant objected to Mr. Roberts testimony, arguing that Employer had neither listed Mr. Roberts as a potential witness nor provided a copy of the second labor market survey on which Mr. Roberts was basing his testimony in compliance with the pretrial order. Employer argued that Mr. Roberts was listed as a witness in Employer's LS-18, which was prepared several months ago. Employer also argued that Mr. Roberts's entire testimony should not be stricken, since a 2000 labor market survey performed by Mr. Roberts was submitted into evidence by Claimant and was reviewed by Dr. Smith, Claimant's physician. (Tr. 48).

Claimant's counsel objected to any part of Mr. Roberts's testimony that would rely on a labor market survey that was completed three days prior to the hearing. Counsel for Employer stated,

> I have not had a chance to discuss those jobs with him, either, so I don't know what he is going to say, other than I think I think they fall within the same wage category. But I don't know what the specific jobs are or anything.
>
> So, we – we just have these reports now to present to you and to Claimant's counsel as well as me.

(Tr. 48). I find that Claimant was given sufficient notice of Mr. Robert as a witness from the LS-18 filed by Employer. In addition, Mr. Robert's first labor market survey is admissible, given the fact that Claimant's counsel utilized and reviewed the survey as well. However, I find that Mr. Robert's testimony as it pertains to the second labor market survey will be disregarded. Employer argues that the results of the labor market survey are a mystery to both parties, and therefore should be admitted. I find this argument insufficient to justify a violation of the pretrial order issued by this Court.

V. Analysis

A. Average Weekly Wage

Employer states that has been paying an average weekly wage of $1,006.64, based on the calculations of a claims examiner for the OWCP, thereby rendering the compensation rate to be set at $636.24. In addition, Employer notes that before being represented by John Houser, Esq., Claimant was represented by Paul Dolittle, Esq. Employer states in its brief that in an earlier matter involving child support payments and how such payments impacted Claimant's disability benefits, an informal conference was held on November 29, 1994. (Employer's Brief, p. 2). Employer states that at that 1994 conference the parties stipulated to an average weekly wage of $1,006.64 with a corresponding maximum compensation rate of $636.24. Claimant argues that the average weekly wage calculation set by the OWCP is not binding, and in addition is incorrect. In addition, Claimant argues that the average weekly wage should be $1086 with a compensation rate set at $724.00.

Claimant cites 20 C.F.R. § 702.317(c), arguing that this regulation renders the recommendation of the OWCP inadmissible.[3] Claimant has failed to read the entire regulation in order to understand its meaning. 20 C.F.R. § 702.317(c) merely states that the district director may not include its recommendation with the evidence compiled from the informal conference. The meaning of the regulation, as Claimant argues, does not render the recommendation "inadmissable" as evidence. (Claimant's Brief, p. 1). However, the recommendation of the district director is by no means binding to this Court, and will be given the appropriate weight with regard to this Court's determination of Claimant's appropriate average weekly wage.

Claimant also argues that the calculations in Employer's exhibit 3-192 are incorrect. Employer's Exhibit 3-192 is a letter written by a Department of Labor Claims Examiner to Insurer, dated February 10, 1989. The claims examiner stated that Claimant's earnings for 1988 totaled $48,

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[3] 20 C.F.R § 702.317 (c) states,

> "Upon receipt of the completed forms, the district director, after checking them for completeness and after any further conferences that, in his and her opinion, are warranted, shall transmit then to the Office of Administrative Law Judge by letter of transmittal together with all available evidence which the parties intend to submit at the hearing (exclusive of X-rays, slides and other materials not suitable for mailing which may be offered into evidence at the time of hearing); the materials transmitted shall not include any recommendations expressed or memoranda prepared by the district director pursuant to § 702.316."

821.46.[4] This total included $41,181.25 gross pay for 1988, plus $2,176.00 holiday pay, $3,424.21 in royalties, and $2,040.00 in vacation time. Claimant's counsel writes in his brief

> But this is incorrect. The Employer erroneously disregarded its Union contract with the ILA that overtime had to be for eight hours if the member was called in for an extra day.

(Claimant's Brief, p. 2). At the hearing, Claimant presented by his counsel a wage report dated 1/13/89. (EX-3-193). Claimant testified that the wage report was incorrect, specifically noting that the wage statements for week 3 and week 6 are incorrect.[5] For instance, for week 3, Claimant testified that the wage statement lists that he worked 44 hours, over a span of 6 days. He states that for him to have worked 44 hours, it would have to have been over a period of five days, not six days, as the wage earning statement states. Claimant testified that when an employee works for an extra day, they were to be paid as though they worked 8 hours on that day. He testified that the wage statement noted that Claimant worked 44 hours in six days.

> It said 44 hours. It said six days. It's not possible for me to work 44 hours in six days. I have to work 48 hours in six days because I am guaranteed another eight hours if I work another day.

(Tr. 36). Employer argues that there are several entries in the wage statement that reflect various hours worked and various amounts of days worked. Employer argues in its brief

> Yet, there are other weeks on that wage statement in which wages were either higher or lower, and the days worked are either higher or lower. (Tr., p.36) Thus, his statement that the number of days should be changed is arbitrary and self-serving, and without merit. He is unable to explain the differentiation between the wages earned, the hours worked, and the days worked on those other weeks. He initially testified that his hourly wage was $17.00, but later noted that it could have been $18.00 per hour (Tr., p. 35), thus signifying that he is not even aware of what his hourly wage was at the time. If he is unsure of his hourly wage, how can he be so sure that the number of days listed on that wage statement are incorrect? It is incredible that in 2003, and employee can look back approximately 14 years to the days and hours

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[4] It should be noted that the claims examiner erroneously added the figures together for a total of $51,821.46. There are no figures that justify this total. Therefore, I am assuming that the extra $3,000 added to Claimant's 1988 earnings was in error. (EX 3-192).

[5] Counsel for the Claimant's statement at the hearing and his brief both indicated that the entry in the wage report for week 5 is incorrect. However, the undersigned notes that week 5 does not reflect the error Claimant addresses. However, it should be noted that week 6 of the wage report does reflect the same problem as week 3. Therefore, the undersigned will address the errors in the wage report as reflected in week 3 and week 6.

> worked in 1988 and 1989 and know exactly how many hours were worked during so many days in any given week. The Employer/Carrier submit that it is highly suspect that the Employee can remember the exact number of hours and days worked over 14 years ago to the extent that 1 week can be singled out as being wrong on a 52-week wage statement.

(Employer's Brief, p. 5).

Either Employer misunderstood or chose to ignore Claimant's argument regarding just two specific weeks recorded in the wage statement. Claimant argues that as a policy, Employer paid an employee an additional 8 hours of pay when an employer is called in to work a sixth day. Therefore, Claimant is arguing that specifically in two entries,[6] it is not possible that he worked 44 hours in 6 days, because the total hours worked for 6 days would have to had been 48 hours. Therefore, Claimant argues that in those weeks, he must have only worked 5 days. Employer's arguments that Claimant cannot possibly remember how many hours he worked on a particular week are irrelevant. Claimant is arguing that based on timekeeping policy, and not on memory, 44 hours in 6 days is impossible.

Looking at the wage statement, it is not, as Claimant argues, impossible that Claimant could not have worked 6 days on week in which he worked 44 hours. Claimant's wage statement reveals that Claimant worked somewhat irregular hours, and on many occasions he worked more or less than 40 hours in five days. For instance, in week 46, the wage report states that Claimant worked 35.5 hours in five days. If Claimant had worked a sixth day, and, according to the timekeeping policy, 8 hours was added, the wage statement would have reflected that Claimant would have worked 43.5 hours. The same problem arises with week 5, in which Claimant was recorded as working 38 hours in five days. An additional 8 hours for another day of work would amount to 46 hours of work. Therefore, it is not the case, as Claimant argues, that 6 days of work automatically must amount to 48 hours of pay. Based on this evidence, I have no choice but to assume that Claimant worked 243 days in 1998. (EX-3-193).

Section 10 of the Act sets forth three alternative methods for determining a claimant's average annual earnings, which are then divided by 52, pursuant to Section 10(d), to arrive at an average weekly wage. The computation methods are directed towards establishing a claimant's earning power at the time of injury. Johnson v. Newport News Shipbuilding & Dry Dock Co., 25 BRBS 340 (1992); Lobus v. I.T.O. Corp. of Baltimore, 24 BRBS 137 (1990); Orkney v. General Dynamics Corp., 8 BRBS 543 (1978); Barber v. Tri-State Terminals, 3 BRBS 244 (1976), aff'd sub nom. Tri-State Terminals v. Jesse, 596 F.2d 752, 10 BRBS 700 (7th Cir. 1979).

Sections 10(a) and 10(b) are the statutory provisions relevant to a determination of an employee's average annual wages where an injured employee's work is regular and continuous. The

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[6]See footnote 5, *supra*.

computation of average annual earnings must be made pursuant to subsection (c) if subsections (a) or (b) cannot be reasonably and fairly applied. To calculate average weekly wage under Section 10(a), one must divide the claimant's actual earnings for the 52 weeks prior to the injury by the number of days he actually worked during that period, to determine an average daily wage. Then, one must multiply the average daily wage by 300 for a six-day worker or 260 for a five-day worker, and, pursuant to Section 10(d), divide the product by 52 to determine the average weekly wage. A percentage of the employee's average weekly wage is the claimant's compensation rate, subject to the maximum and minimum compensation rates established under Section 6 of the Act. See, e.g., Empire United Stevedores v. Gatlin, 936 F.2d 819, 25 BRBS 26 (CRT) (5th Cir. 1991); Duncanson-Harrelson Co. v. Director, OWCP, 686 F.2d 1336 (9th Cir. 1982), vacated in part on other grounds, 462 U.S. 1101 (1983); Turney v. Bethlehem Steel Corp., 17 BRBS 232 (1985).

Claimant's counsel argues that based on Employer's W-2 statements, Claimant's average weekly wage should be $1,086, with a corresponding compensation rate of $724.00. Claimant argues that this number should be derived from the W-2 filed with the Internal Revenue Service, which recorded that Claimant earned $44,181.25. Added to this figure are the vacation, royalty and holiday pay as detailed in Employer's exhibit 3-194, totaling $52,345.38.[7]

As stated above, to calculate average weekly wage under Section 10(a), one must divide the claimant's actual earnings for the 52 weeks prior to the injury by the number of days he actually worked during that period, to determine an average daily wage. Then, one must multiply the average daily wage by 260 for a five-day worker, and divide the product by 52 to determine the average weekly wage.

Using the calculation set out by Section 10(a) of the Act, the calculation is as follows:

$$\frac{\$52,345.38 \text{ (actual earnings in 1998)}}{243 \text{ (number of days worked that pay period)}} = \$215.41 \text{ (Average Daily Wage)}$$

The average daily wage is then multiplied by 260 for a five-day worker, and then divided by 52 to determine the weekly wage:

[$215.41 (Average Daily Wage) x 260 (5-day Worker)= $56,007.40] / 52 = $1,077.06

[7] This figure is derived from EX-3-194. As detailed in Employer's exhibit, the three W-2s indicate that Claimant earned $44,181.25, plus $4216.00, plus $3,948.13.

Employer argues that the issue of Claimant's average weekly wage was already stipulated by the parties in an earlier proceeding on November 29, 1994, and was set at $1,006.64. Employer argues that at a proceeding involving child support payments and how that impacted the Claimant's disability benefits on November 29, 1999, an informal conference was held.[8] At that conference, the parties stipulated to an average weekly wage of $1006.64 with a stipulated compensation rate of $636.24. Employer has been paying benefits based on the stipulated average weekly wage.

As a general rule, stipulations made by parties are binding upon those who made them. Littrell v. Oregon Shipbuilding Co., 17 BRBS 84 (1985). Section 18.51 of Title 29 of the Code of Federal Regulations states that parties may enter into stipulations at any stage of the proceedings, but until such time as the stipulations are received in evidence at a hearing or prior thereto, they are not binding on the parties.

Employer cites the Benefits Review Board's decision in Fox v. Melville Shoe Corporation, 17 BRBS 71 (1985) as "directly on point" with the issue at hand. (Employer's Brief, p. 6). In Fox, the Board upheld the ALJ's determination not to reopen the record to recalculate the claimant's stipulated average weekly wage. Both parties had stipulated to an average weekly wage, with the claimant reserving the right to reopen the record to correct computational errors. Following the hearing, the claimant filed a motion with the court to reopen the hearing to admit additional evidence regarding average weekly wage, arguing that the employer had not properly included vacation pay in its calculation, and had only used an average of one year of claimant's wages despite the fact that claimant had been employed for over 20 years. The ALJ denied claimant's motion to reopen the hearing, and noted that claimant should have raised an objection to the methodology of the average weekly wage computation at the hearing before the record was closed. Fox, 17 BRBS at 73. The Board stated,

> Since claimant was provided the opportunity to present arguments regarding the method of calculation at the hearing, the administrative law judge did not abuse his discretionary power over the conduct of the hearing in refusing to allow further post-hearing arguments. See 20 C.F.R. § 702. 338; Smith v. Ceres Terminal, 9 BRBS 121 (1978).

Id.

I find that the Fox opinion is factually different from this case. Unlike Fox, where the ALJ had accepted the stipulations by the parties and then refused to reopen the hearing, in this case the stipulations have not been accepted by this Court. The Board has previously affirmed rulings where

[8] At the time, Claimant was represented by Paul Dolittle, Esq. (Employer's Brief, p. 2).

the ALJ has determined that a claimant was not bound by the stipulations made at an informal conference. Warren v. National Steel and Shipbuilding Co., 21 BRBS 149 (1988). The Board in Warren stated

> As the administrative law judge noted, the language of this section is clear. The parties may enter into stipulations at any stage of the proceedings, but until such time as the stipulations as the stipulations are received in evidence at a hearing or prior thereto they are not binding on the parties. The administrative law judge acted within his discretion in not accepting all of the parties' stipulations in evidence and therefore his decision not to bind the parties to all of their prior stipulations is affirmed.

Warren, 21 BRBS 149.

I find that it is within my discretion to disregard the stipulation from an informal conference. Therefore, based on the discussion above, I find that Claimant's average weekly wage is $1,077.06. Claimant's compensation rate is of course still limited by the maximum compensation rate set out in Section 6 and set by the Department of Labor. Therefore, Claimant's compensation rate remains set at $636.24.

B. Extent of Disability

Claimant argues that he is permanently and totally disabled, and that he has been unable to maintain employment despite the fact that he has actively sought work. (Claimant's Brief, p. 4). Employer argues that Claimant is not permanently and totally disabled, but rather permanently partially disabled, and that suitable alternate employment exists for Claimant.

Employer cites a July 2000 medical evaluation performed by Dr. Smith, in which Claimant completed a physical capacity assessment which outlined his restrictions as being limited to four hours of sitting in an eight hour day, one hour of standing, one hour of walking, one hour of driving, as well as occasional bending, squatting, climbing and reaching. Claimant also has marked limitations in flexibility in his lower extremities, decreased endurance, and limited climbing and balancing abilities. Claimant was advised to never twist, and only reach and bend occasionally. In addition, Dr. Smith stated that Claimant can occasionally lift items that weigh between 11 to 20 pounds and can frequently carry items that weigh between 1 and 10 pounds. No work restrictions were assigned to Claimant by his treating psychiatrist. (Employer's Brief, p. 6-7; Tr. 55).

Mr. John Roberts, a rehabilitation counselor, completed a labor market survey in 2000 on behalf of Employer, listing several openings that he felt fell within Claimant's work restrictions. Mr. Roberts has been a rehabilitation counselor for approximately fifteen years, and is certified as a case manager, certified disability case manager, and is a certified disability analyst. (Tr. 50).

In compiling this 2000 labor market survey, Mr. Roberts stated that in March 2000 he was sent Claimant's deposition and medical records. (Tr. 53 & 70). From these records, Mr. Roberts stated that he was able to perform a vocational assessment. He stated that from these records he was able to learn of Claimant's educational and work history, his functional abilities and to determine whether Claimant possessed any transferable job skills. He did not personally meet with Claimant, and merely performed a records review. (Tr. 69). Mr. Roberts stated

> I was able to glean from the records from Dr. Graham Smith, as well as functional capacity evaluation that he retained the ability to perform light duty types of jobs and doing the transferrable skills analysis I learned that he has performed past relative work excluding the substitute teaching and things beyond or post injury that he has worked in a medium duty classification.
>
> His earliest dated records of his functional capacity evaluation was is 1990, and I had sent to Dr. Graham Smith a functional capacity sheet which again showed similar findings of abilities to work in the light duty classification, and it was at that time after reviewing these records that I performed a labor market survey.

(Tr. 54). Mr. Roberts stated that from the reports provided to him, Claimant can perform sedentary and light duty work. (Tr. 55).

Mr. Roberts stated that based on these restrictions, he performed a labor market survey in March of 2000 and another a week before trial. For the reasons stated previously in this opinion, the undersigned will disregard the latter.

Mr. Roberts testified that the March 2000 labor market survey identified twelve to thirteen positions available that he deemed would be appropriate for Claimant. These positions included an auto parts salesperson, a door person at an apartment complex, a dispatcher at a trucking company, a security guard, a refrigerator mechanic/technician, a maintenance technician at an apartment complex, a warehouse shipping and receiving clerk, and a driver for an auto parts store. Mr. Roberts stated that he based these positions on the functional capacity test that had been administered ten years prior to the labor market survey. He stated that while some positions did not fit Claimant's restrictions, he stated that because he was relying on ten year old restrictions, he wanted to find positions that would be acceptable for Claimant if some of his restrictions had been lifted in the past

ten years. (Tr. 58). Therefore, Mr. Roberts noted that any position that dealt with refrigeration did not fall within the restrictions set out in the functional capacity test, because they required lifting between 20 to 50 pounds. Mr. Roberts stated

> So, those jobs are not within that functional capacity, but clearly were within his transferability of skills and previous work experience. All the other jobs listed are within the functional capacity assessment of 1990.

(Tr. 58). Mr. Roberts also stated that the jobs that were within the 1990 functional capacity test also fit the physical capacity assessment that was completed by Dr. Smith in July 2000. (Tr. 58). He also stated that Dr. Smith rejected all of these positions. Mr. Roberts stated that most of the positions that he found are within the pay range of approximately $7.00 and $9.00 an hour in 1989, and were not limited to 40 hour work weeks. Employer argues that these positions result in a present day weekly wage range from $260.00 to $400.00, which would equate to an annual wage earning capacity of between $13,000 and $20,000 as early as July 2000.

Employer argues that when Dr. Smith reviewed the labor market survey on February 23, 2001, he reviewed the jobs with Claimant, who advised Dr. Smith that he would be unable to perform the jobs identified. Employer argues that Claimant compelled Dr. Smith to reject all the positions as unsuitable, even though some positions fit within Claimant's physical restrictions. (Employer's Brief, p. 8).

Mr. Roberts testified that some positions in the labor market survey would not be suitable for Claimant. When questioned further, Mr. Roberts admitted that working as a sales associate would require Claimant to spend a considerable amount of time on his feet. He also admitted that as a shipping and receiving clerk and an auto parts sales person would include some carrying. However, he stated

> [An auto parts salesperson] could sit and mostly it's looking up on a computer the parts number and then they would go and retrieve from the back the parts number and/or go in front of the counter to help with like waxes and whatever. It's not much lifting and the majority of this job, again, other than coming from behind the counter and retrieving parts, they sit on a stool while they are looking up the parts or talking with the individual.

(Tr. 71-72).

The burden of proving the nature and extent of disability rests with Claimant. Trask v. Lockheed Shipbuilding Const. Co., 17 BRBS 56, 59 (1980). Disability is generally addressed in terms of its nature (permanent or temporary) and its extent (total or partial). The permanency of any disability is a medical rather than an economic concept. Disability is defined under the Act as an "incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Therefore, for Claimant to receive a disability award, an economic loss coupled with a physical and/or psychological impairment must be shown. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991). Thus, disability requires a causal connection between a worker's physical injury and her inability to obtain work. Under this standard, a claimant may be found to have suffered no loss, a total loss or a partial loss of wage earning capacity.

To establish a prima facie case of total disability, the claimant must show that he is unable to return to his regular or usual employment due to his work-related injury. Elliott v. C & P Telephone Co., 16 BRBS 89 (1984); Harrison v. Todd Pacific Shipyards Corp., 21 BRBS 339 (1988). Any disability suffered by Claimant before reaching maximum medical improvement is considered temporary in nature. Berkstresser v. Washington Metropolitan Area Transit Auth., 16 BRBS 231 (1984).

Claimant argues that he is entitled to total disability benefits, arguing that he is unable to maintain a job due to the pain in his back. To establish a *prima facie* case of total disability, Claimant must show that he is unable to return to his regular or usual employment due to his work-related injury. Elliot v. C & P Telephone Co., 16 BRBS 89 (1984); Harrison v. Todd Pacific Shipyards Corp., 21 BRBS 339 (1988). At this initial stage, Claimant need not establish that he cannot return to any employment, only that he cannot return to his former employment. Elliot v. C & P Tel. Co., 16 BRBS 89 (1984). Both Employer and Claimant note that based on his restrictions, Claimant is unable to perform his former position, and therefore, I find that Claimant has fulfilled this evidentiary burden.

Once an employee has shown that his work-related injury prevents him from performing his former job, the burden shifts to the employer to show that there is "suitable alternate work ... available in the community." Stevens v. Director, OWCP, 909 F.2d 1256, 1258 (9th Cir. 1990), cert. denied sub nom, Lockheed Shipbuilding Co. v. Director, OWCP, 498 U.S. 1073 (1991), quoting Hairston v. Todd Shipyards Corp., 849 F.2d 1194, 1996 (9th Cir. 1988). If the Employer fails to meet this burden, the disability is considered total, and most likely permanent. Id.

In opposing a claim for total disability compensation, the employer has the burden of showing that suitable alternate employment is available. See Chappel v. Newport News Shipbuilding and Dry Dock Co., 10 BRBS 81, 86 (1978). An employer can meet the burden of proving suitable alternate employment by identifying specific jobs in close proximity to the place of injury which are available for the claimant. Royce v. Erich Construction Co., 17 BRBS 157, 158-59 (1985). The employer is not required to act as an employment agency for the claimant. It must, however, prove the

availability of actual, not theoretical, employment opportunities by identifying specific jobs available to the employee within the local community. New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1042-43, 14 BRBS 156, 164-65 (5th Cir. 1981), rev'g 5 BRBS 418 (1977); Bumble Bee Seafoods v. Director, OWCP, 629 F.2d 1327, 1330, 12 BRBS 660, 662 (9th Cir. 1980); Armfield v. Shell Offshore, Inc., 30 BRBS 122, 123 (1996); Royce v. Elrich Constr. Co., 17 BRBS 157 (1985); Pilkington v. Sun Shipbuilding & Dry Dock Co., 9 BRBS 473, 480 (1978); Salzano v. American Stevedores, 2 BRBS 178 (1975), aff'd, 538 F.2d 933, 4 BRBS 195 (2d Cir. 1976); Bunge Corp. v. Carlisle and T. Michael Kerr, Deputy Assist. Sec., OWCP, 227 F.3d 934 (7th Cir. 2000). In determining the Employee's ability to perform possible work, the Board has also held that the Employer must establish the precise nature and terms of these jobs, including the appropriate pay scales. Reich v. Tracor Marine, Inc., 16 BRBS 272, 273 (1984). The claimant does not have the burden of showing that no conceivable suitable alternate employment is available; rather, the employer must prove that suitable alternate employment exists. Shell v. Teledyne Movible Offshore, 14 BRBS 585 (1981); Smith v. Terminal Stevedores, 11 BRBS 635 (1979).

If the employer meets its burden and shows suitable alternative employment, the burden shifts back to the claimant to prove a diligent search and willingness to work. Williams v. Halter Marine Serv., 19 BRBS 248 (1987). If employee does not prove such, at the most his disability is partial, not total. See 33 U.S.C. § 908(c); Southern v. Farmers Export Co., 17 BRBS 64 (1985).

In order to determine whether Employer has established suitable alternate employment, the Court will review each position in the labor market survey completed in 2000, and determine whether Claimant would have been able to hold each position given his restrictions. In addition, because both parties have agreed that Claimant cannot return to his former position as a refrigeration mechanic, such positions will be disregarded as outside the scope of Claimant's functional capacity.

The first two positions in the 2000 labor market survey provided by Mr. Roberts are a maintenance technician positions for what appear to be apartment complexes in Jacksonville, Florida. The duties of the position require "basic grounds keeping, maintenance of heating/AC ducts." The position requires standing and walking 34% to 66% of the time. The position also requires occasional (0-33%) stooping/ bending and occasional squatting and crouching. The position also involves occasional climbing, driving, lifting, carrying and reaching. Dr. Smith did not approve these jobs. I find that these positions are not appropriate for Claimant based on his restrictions that limit his walking and standing to one hour. In addition, Claimant's restrictions also include limited lifting and carrying. As detailed in the job analysis these positions require frequent standing and walking, as well as occasional climbing, lifting and carrying. Based on the descriptions of these positions, I find that Claimant would not be able to perform such a physically demanding job.

The labor market survey also listed the position of an unarmed security guard. The position as described in the job analysis entails "securing areas, patrolling areas, protecting property." The position requires frequent (34%-66%) standing and walking, and occasional (0%-33%) sitting. The

position also requires frequent climbing of stairs and driving. Dr. Smith did not approve this position. I find that Claimant would be unable to perform such a position, based on the fact that he is limited to one hour of standing and one hour of walking. I find it evident that based on Claimant's restrictions, he would be unable to work in such a position that requires such prolonged standing and walking.

The labor market survey also listed the position of a door person, which is described as "open door, greet residents, assist residents with packages." The position requires frequent (34%-66%) standing and walking, and occasional (0%-33%) sitting, lifting and carrying 0-10 pounds, and reaching to open a door. The position was not approved by Dr. Smith. Based on Claimant's restrictions, I find that this position is not compatible with Claimant's physical limitations. As stated previously, Claimant is limited to standing and walking for one hour. It is clear from the description on the job analysis the position of a door person requires more than an hour of standing and walking. Therefore, I find that the position of door person is not suitable for Claimant.

The labor market survey also listed the two positions for Claimant to work as a dispatcher, answering phones and dispatching trucks. The position requires frequent(34% to 66%)sitting and occasional (0%-33%)walking. The position also requires frequent reaching for telephones and a microphone. Both positions were not approved by Claimant's physician. I find that given Claimant's restrictions prohibiting him from sitting more than four hours a day, as well as his restriction of only occasional reaching prohibits his ability to perform these positions. Claimant would be sitting longer than his restrictions allowed and would also be reaching too often. Therefore, I find that the position of dispatcher is not suitable for Claimant.

The labor market survey also indicated that Claimant could work as a driver and warehouse worker. The position is described as "delivering parts, stocking parts." According to the job analysis, the position requires frequent (34%-66%) standing, walking, stooping/bending, squatting/crouching, kneeling, climbing, driving, lifting of 10-25 pound items, carrying 10-25 pound items, and reaching. The position also involved occasional (0%-33%) sitting. I find that this position is not compatible with Claimant's restrictions. First, the position requires frequent bending, squatting, climbing, and reaching. Claimant's physical restrictions allow for such actions on an occasional, not frequent, basis. Based on Claimant's restrictions, I find that the position of driver and warehouse worker is not a suitable position for Claimant.

Another position that Mr. Roberts indicated may be suitable for Claimant was a warehouse shipping and receiving clerk. The position included frequent (34%-66%) standing, sitting, walking, stooping/bending, squatting/crouching, kneeling, twisting body, twisting neck, driving, lifting (0-80 lbs.), reaching, and pushing and pulling with arms. For the same reasons articulated in the above paragraph, I find that this position is not compatible with Claimant's restrictions. Based on Claimant's restrictions, it is clear that a position in which Claimant would be twisting, lifting heavy objects, and frequently stooping and bending would not be appropriate for a person who is limited

in performing such movements. Claimant's restrictions allow only for occasional bending, squatting, climbing and reaching. Therefore, the position of warehouse shipping and receiving clerk is not suitable for Claimant.

Mr. Roberts also indicated that the position of an auto parts salesperson may be appropriate for Claimant. The position is describes in the job analysis as "selling auto parts, invoicing, retrieving auto parts." As stated, *supra*, Mr. Roberts admitted in his testimony that such a position would involve some carrying, but that the majority of the time Claimant would "sit on a stool while ... looking up the parts or talking with the individual." (Tr. 71-72). However, the job analysis indicates that Claimant would not be sitting at any time for the position. Rather, the job is described as involving frequent (34%-66%)standing, walking, climbing, reaching and lifting and carrying 0-20 pounds. The position also involves occasional (0%-33%) stooping/bending, squatting/crouching, kneeling, and driving. Based on the fact that Claimant is only capable of walking and standing for one hour, I find that this position is too active for Claimant. In addition, such a position involves frequent climbing and reaching, two activities that Claimant can only do on an occasional basis. Also, it should be noted that Claimant is limited to carrying objects that weigh up to 10 pounds, and this position involves carrying objects that weigh up to 20 pounds. Based on Claimant's restrictions and the description of this job, I find that this position is not suitable for Claimant.

Having rejected all of the job openings in the 2000 Labor Market Survey performed by Mr. Roberts, I find that Employer has not sufficiently presented evidence proving suitable alternate employment available for Claimant. Due to the fact that Employer has failed to prove suitable alternate employment, Employer has not rebutted Claimant's *prima facie* case. Therefore, I find that Claimant is totally disabled.

C. Maximum Medical Improvement

Any disability suffered by Claimant before reaching maximum medical improvement ("MMI") is considered temporary in nature. Berkstresser v. Washington Metropolitan Area Transit Auth., 16 BRBS 231 (1984). An employee is considered permanently disabled if he has any residual disability after reaching maximum medical improvement. Lozada v. General Dynamics Corp., 903 F.2d (2d Cir. 1990); Sinclair v. United Food & Commercial Workers, 13 BRBS 148 (1989); Trask v. Lockheed Shipbuilding & Construction Co., 17 BRBS 56 (1985). A condition is permanent if claimant is no longer undergoing treatment with a view towards improving his condition or if his condition has stabilized. Leech v. Service Engineering Co., 15 BRBS 18 (1982); Lusby v. Washington Metro. Area Transit Auth., 13 BRBS 446 (1981). Claimant argues that the date of MMI is the date of Claimant's injury. Employer contends that Claimant's date of MMI is February 21, 1995 from a psychiatric standpoint, and April of 1990 from an orthopedic standpoint. (Tr. 7-8).

Employer argues that the date of MMI should be based on Claimant's medical records. Dr. Graham-Smith set Claimant's MMI date on April 11, 1990, with a 22.5% permanent partial impairment rating. (CX-25). The undersigned would note that it was reported that Webb could report to work on the following Monday, which would have been April 16, 1990. Psychiatrically , Claimant's physician set Claimant's MMI at February 21, 1995 with a 0% permanent partial impairment rating. (CX-31, CX-68). I find that the medical records and opinions of Claimant's physicians most persuasive in determining when MMI was reached.

The countless medical records and doctor's visits are evidence that Claimant was in fact undergoing treatment for his condition. Based on the fact that Claimant sought treatment on an ongoing basis convinces me that Claimant reached MMI on the date his physicians determined his condition has stabilized. The back disorder is clearly the major impairment and the date of MMI reflects that concern.

VI. Order

Accordingly, it is hereby ORDERED that:

1. Employer, Puerto Rico Marine Shipping, is hereby ordered to pay Claimant, Donald H. Webb, temporary total disability at the compensation rate of $636.24 per week, from January 17, 1989 to April 10, 1990;

2. Employer is hereby ordered to pay Claimant permanent total disability at the rate of $636.24 per week, from April 11, 1990 to the present, and continuing;

3. Upon the expiration of 104 weeks after April 11, 1990 such compensation and adjustments shall be paid by the Special Fund established pursuant to the provisions of 33 U.S.C. § 944;

4. Employer shall receive credit for any compensation already paid;

5. All computations are subject to verification by the District Director;

6. Interest at the rate specified in 28 U.S.C. § 1961 in effect when this Decision and Order is filed with the Office of the District Director shall be paid on all accrued benefits and penalties, computed on the date each payment was originally due to be paid. See Grant v. Portland Stevedoring Co., 16 BRBS 267 (1984);

7. Within thirty (30) days receipt of this decision and order, Claimant's attorney shall file a fully supported and fully itemized fee petition, sending a copy thereof to Employer's counsel, who shall then have twenty (20) to respond thereto.

A

RICHARD K. MALAMPHY
Administrative Law Judge

RKM/AM
Newport News, Virginia